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No. 03 -46

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IN THE

Supreme Court of The United States

GLOBAL RELIEF FOUNDATION, INC.,

Petitioner,

v.

JOHN W. SNOW, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

From page 1 to 18, the Brief for the Respondent in Opposition ("Opposition") is replete with errors. Indeed the very question presented by respondents is fundamentally flawed. Compare Opp'n at I (arguing that the legal standard governing this appeal is abuse of discretion) with Duct-O-Wire Co. v. U.S. Crane, Inc., 31 F.3d 506, 508-09 (7th Cir. 1994) (holding that errors of law made during preliminary injunction proceeding, like those identified by GRF in its three questions presented, are reviewed de novo by appellate courts). Based upon this error, as well as the other errors identified below, this Court should discount respondents' Opposition and grant the Petition for writ of certiorari.

A. Immediate Review is Crucial to be Meaningful.

Contrary to respondents' argument otherwise,[1] this Court should not wait for the trial court to render a final decision before reviewing the merits of GRF's case. This Court has often reviewed interlocutory orders and opinions in order to correct injustices similar to that perpetrated by Respondents on GRF. See e.g., Will v. United States, 389 U.S. 90, 94-98 (1967) (granting certiorari despite absence of finality in district court where the implications of the appellate interlocutory decision affected the orderly administration of justice); Youngstown Sheet & Tube Co v. Sawyer, 343 U.S. 579, 585, 587 (1952) (establishing that inquiry was ripe on the constitutionality of Presidential Executive Order even though case had proceeded no further than the preliminary injunction stage); Larson v. Domestic & Foreign Commerce Corporation, 337 U.S. 682, 685 n.3 (1949) (reviewing appellate decision which granted injunctive relief because the issue was "fundamental to the further conduct of the case"); Land v. Dollar, 330 U.S. 731, 734 n.2 (1947) (same); Aetna Casualty & Surety Co. v. Flowers, 330 U.S. 464, 467 (1947) (affirming authority to review an action of an appellate court which had remanded to a district court); United States v. General Motors Corporation, 323 U.S. 373, 377 (1945) (reviewing power of sovereign to use private property because correctness of decision as to exercise of that power depended upon review of its constitutional validity and limitations).

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[1] See Opp'n at 10 (arguing that "[t]his Court's usual practice is to await final judgment in the lower courts before exercising its certiorari jurisdiction") (citing Virginia Military Inst. v. United States, 508 U.S. 946, 946 (1993))

Quite simply, when "the effect of the order is immediate and irreparable . . . review by this Court of the propriety of the order must be immediate to be meaningful." Federal Power Commission v. Transcontinental Gas Pipe Line Corp., 423 U.S. 326, 332 (1976) (authorizing review of a challenged interlocutory order).

Here, GRF will suffer an immediate and irreparable injury if this Court does not review the Seventh Circuit's decision before the case is remanded to the trial court. On remand, GRF would be required to prepare for and defend sweeping charges of wrongdoing dating back well over a decade without knowing the specifics of the charges; and justify every single charitable contribution it ever made with the hopes that some of its evidence would respond to the redacted portions of the record relied upon by Respondents. GRF would be subjected to enormous expense and legal fees if it were required to blindly respond to the government's unconstitutional secret evidence[2] after this case was remanded for trial. This burden is particularly acute considering that GRF has been deprived of almost all means to pay for its defense of any trial. Accordingly, before GRF is subjected to the hardship of a trial, it would be particularly appropriate for this Court to determine the constitutionality of the procedures which will be utilized to affirm OFAC's death sentence. Larson, 337 U.S. at 685 n.3 (writ of certiorari granted in order to review injunctive issue when the issue was "fundamental to the further conduct of the case").

Additionally, this Court would promote judicial economy by reviewing this case now since immediate review diminishes the prospect that this case be tried twice and appealed three times.[3] Specifically, if

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[2]Respondentss purported to "classify" their administrative record pursuant to the recently enacted provisions of the USA PATRIOT Act, § 106(2), 115 Stat. 278, which amended IEEPA, 50 U.S.C. §1702(c). See Pet. App. 58c and Opp'n at 6.

[3]Of course, the Court would obviate any need for further trials or appeals if it holds that prosecution under Executive Order 13224 ("E.O. 13224") is impermissible based upon an application of the Ex Post Facto or Bill of Attainder clauses.

this Court refuses to review this matter now and GRF loses at trial in the district court, GRF would most certainly appeal not only the factual findings underlying the SDGT designation, but also the inadequacy of the procedural protections afforded GRF. If, in this second appeal, GRF then prevailed on its argument that the record developed at trial was incomplete because the district court and Seventh Circuit's procedures (e.g. the use of secret evidence) were unconstitutional, this Court would be required to remand for a second trial at which GRF would be allowed to fully develop the record by responding to what is now the government's secret evidence. Whichever party lost this second trial would most certainly note a third appeal! On the other hand, if this Court delineates the appropriate procedural protections that should be afforded GRF on remand and outlines the substantive law underlying the government's actions, on remand, the trial court would be in a much better position to develop a complete record, which would in turn allow any subsequent appellate court to render a final decision on that record if either party took a second appeal. Thus, this Court would efficiently foster the development of the record by setting the legal parameters of this case on this appeal. Since GRF's legal challenge to the government's procedures has been fully briefed and the Court can rule on the constitutionality of those procedures with the current record, see infra, the parties and the courts would practically benefit from immediate Supreme Court review.

Moreover, GRF has framed the issues in this case such that further development of the record below is immaterial to this appeal. For example, GRF has focused its primary arguments in this appeal around legal issues which do not have significant factual underpinnings. Pet. App. at 9a. (respondents admitting that the Seventh Circuit "avoided any inquiry into the facts and d[id] not attempt to anticipate the ultimate resolution of GRF's claim"). Additionally, the Seventh Circuit even described its decision to uphold the use of secret evidence as "conclusive and not subject to reexamination in the district court. . . ." Pet. App. at 9a. Since the legal contentions addressed by the Seventh Circuit and presented here for review are final and do not require any further factual development, id., it would be pointless for this Court to await any factual findings entered by the trial court after remand. GM Corp., 323 U.S. at 377 (granting certiorari to review appellate decision, even though appellate court remanded for further proceedings, in order to set guidelines as to the constitutional limitations on government's power to

take private property).

Respondents also suggest that GRF's due process challenge to the permanent SDGT designation (as opposed to GRF's due process challenge to the interim blocking "pending investigation") is not ripe for review.[4] See Opp'n at 16 ("any challenge petitioner may have to the procedures used in connection with OFAC's final designation is not yet ripe for appellate review"). Respondents have apparently revived (by implication) the arguments they made in their Suggestion of Mootness to the Seventh Circuit. See Pet. app. 3a. However, this argument was soundly rejected by the Seventh Circuit which held that GRF asked both the District Court and the Seventh Circuit not only to lift the interim blocking pending investigation but "to stave off" the permanent SDGT designation procedures. See id. 3a-4a (holding that GRF asked the trial court "to block the [SDGT] designation" and "reiterated" those arguments "in the appellate briefs"). "Dismissing this appeal, and directing GRF to start from scratch in the district court with a challenge to the [SDGT] designation of October 18, then would compound [GRF's] injury by extending the length of an illegal administrative action". Pet. App. 4a.

B. Respondents' Construction of IEEPA is Unworkable.

Respondents have also failed to rebut any of GRF's arguments regarding the proper construction of IEEPA. Compare Pet. at 20 to 25 with Opp'n at 12 to 13. For example, respondents's Opposition is built upon a mischaracterization of GRF's arguments. See Opp'n at 8 and 12. Quite simply, GRF has never argued that "domestically chartered corporations are categorically excluded from IEEPA's coverage." Pet. at 20-25 (arguing that OFAC's jurisdiction to block property depended only on whether a foreign person had an identifiable interest in the claim and not whether the foreign person might benefit from that claim).

Respondents also argue that IEEPA blocking determinations

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[4]Contrary to defendants' repeated efforts to characterize GRF's appeal otherwise, see Opp'n at 7, 111, GRF did not limit its appeal to a challenging the enforcement of the interim blocking pending investigation but also sought to enjoin the permanent SDGT designation.

should focus on how "assets could be controlled and used, not on bare legal ownership." Opp'n at 13. For example, Respondents reason that GRF is subject to blocking since at least some of its charitable assistance has been given to and "used" by foreign nationals. Id. at 13 (arguing that IEEPA is applicable to all of GRF's assets since "its funds are applied for the benefit of non-citizens living abroad"). However, respondents' construction is grossly overbroad because it authorizes OFAC to completely freeze a U.S. citizen based upon its speculation regarding how a person "could" potentially use its property. If the government could prove that a foreign national had a property interest in a U.S. citizen's property by simply speculating about how a foreign person might ultimately use or benefit from that U.S. citizen's property, the government's power to block such property would be as broad as its ability to imagine possible connections. Such a result is untenable.[5]

Furthermore, respondents improperly support their blocking with the fact that GRF had at one time two corporate directors who were foreign nationals. Although it is true that 50 U.S.C. § 1702 authorizes the President to block the assets of foreign nationals, § 1702 is tempered by § 1701 which only authorizes the President to block the assets of foreign nationals who have some connection to a "national emergency." To date, there has been no finding that anybody with an interest in GRF has connections to a national emergency. Since such a finding is a prerequisite to the blocking, the Seventh Circuit improperly affirmed respondents' blocking to the extent it was premised on the fact that GRF had foreign national directors.

In any event, respondents cannot block all of GRF's assets even if foreign nationals have an interest in GRF's property. Instead, respondents can only block those property interests in which the foreign nationals have an interest. For example, as explained in GRF's Petition, if a foreign national is a stockholder in a corporation, the President conceivably can block the stockholders' shares (if all the other elements of IEEPA are satisfied) but not the entire company. Otherwise, the President could shut down General Motors if it found a single member of al Qaeda who owned stock in that company.

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[5]Respondents argue that GRF has cited no authority for its definition of property interest. Opp'n at 13. This is not the case. Pet. at 20-24 (relying upon Dames & Moore).

Moreover, respondents suggest that their blocking of GRF is not Ex Post Facto because on its face, IEEPA predates GRF's activities. Opp'n at 9. However, GRF has never argued that IEEPA is Ex Post Facto on its face, but as applied to GRF. In other words, although IEEPA may predate GRF's activities, neither Executive Order 13224 nor the amendments to the USA PATRIOT ACT, predate any of the allegedly wrongful acts supporting the SDGT designation. Thus E.O. 13224 as applied to GRF violates the Ex Post Facto clause because GRF is being sanctioned for its association with people who were designated under this executive order after GRF allegedly had its contacts with those who have since been designated.[6]

Respondents also argue that their blocking of GRF is not Ex Post Facto since it has always been illegal to give comfort to the enemy. Opp'n at 9, 17. Although this may be true, such an offense is commonly known and punishable as treason. Those charged with such an offense are entitled to a trial by jury based upon the testimony of at least two witnesses. Since respondents have effectively convicted GRF of treason, without complying with the Constitution's procedural safeguards, their SDGT designation is clearly unconstitutional. Cramer v. U.S., 325 U.S. 1, 44 (1945) ("We do not intimate that Congress could dispense with the two-witness rule merely by giving the same offense another name").

C. **OFAC's Procedures Violate Due Process.**

Respondents, like the Seventh Circuit, have also failed to identify any governmental interests which justify the use of secret evidence in this case. Compare Opp'n at 14 to 15 (citing Department of Navy v. Egan, 484 U.S. 518, 527 (1988); EPA v. Mink, 410 U.S. 73 (1973) with Pet. at 16 to 20. For example, respondents cite to Mink which authorizes the use of secret evidence when determining whether to grant or deny a Freedom of Information Act request. However, Mink

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[6]Clearly, executive orders instituted under IEEPA are legislative acts. Indeed, IEEPA is a designation of legislative power from Congress to the President. For this reason, E.O. 13224 is clearly a legislative act subject to the Ex Post Facto clause and the Bill of Attainder Clause regardless of respondents' argument otherwise. But see Opp'n at. By expounding rules of generally applicability, E.O. 13224 clearly created legislative prohibitions.

is distinguishable from the instant matter since a FOIA applicant does not have a property or liberty interest to see the government's documents. Pet. at 16-17. Thus, a FOIA applicant can be deprived of almost all property and/or liberty, with little, if any, due process protections. Id. IEEPA designees like GRF on the other hand are subjected to substantial deprivations of property and liberty and must be afforded the full panoply of due process rights including the right to see (as well as confront) the evidence against them. Id.

Defendants' reliance on Egan is similarly misplaced. In that case this Court merely recognized that the grant or denial of a security clearance to a particular employee is a sensitive and inherently discretionary judgment call that is committed by law to the Executive Branch. Department of Navy v. Egan, 484 U.S. 518, 527 (1988) (holding that nobody has a right to a security clearance). In other words a government employee, like a FOIA applicant, does not have a significant property interest protected by the Constitution. Accordingly, as in Mink, the government has a relatively low threshold to meet under the Eldridge test when determining what evidence to disclose during the security clearance application process because the employee's limited right to see any classified evidence is substantially outweighed by the government's national security interests. This analysis does not hold true in the IEEPA arena because IEEPA designees have tremendous countervailing interests which need protection. See geneally Pet.

If there was any question that the use of ex parte and in camera proceedings is important to the public, it was put to rest by the number of articles written on the subject. As of the date of this brief, 1,308 news articles have been written about GRF, an excess of 3,000 have been written about the PATRIOT Act, 1,032 have been written about IEEPA and in excess of 3,000 articles have been written about blocking assets of Muslims. Additionally, Congressman John Conyers, Jr., Ranking member of the House Judiciary Committee criticized respondents' use of secret evidence, stating:

> The Bush Administration's decision to use secret evidence against the Global Relief Foundation is a slap in the face of civil liberties proponents and the thousands who supported him because of his campaign pledge to end this unconstitutional practice.

> Clearly, the President has reneged on his pledge by seizing millions of dollars from U.S.-based Muslim charities without disclosing evidence to support their allegations.
>
> I call on the President to abide by his campaign promise and to cease the practice of gutting the very freedoms we are attempting to protect.

See Press Release, March 18, 2002, Conyers: Bush Lied on Secret Evidence.

Respondent John Ashcroft has been traveling the country trying to manufacture support for the USA PATRIOT Act and a companion bill that would go further, the Domestic Security Enhancement Act of 2003, ("Patriot Act II"), which would further broaden the Executive's power. Additionally, Senator Orrin Hatch's bill grants indefinite power to the Justice Department to further detect and prosecute terrorists; it does not even attempt to define the parameters of this power or what actions will be taken against offenders. This legislation would give the Executive Branch a "unchecked authority" to prosecute anyone it deems a terrorist. It is time for sober review of the PATRIOT Act and the Executive's anti-terrorism effort's that diminish due process safeguards. This Court is charged with maintaining the delicate balance between individual liberty and state security. "Even the war power does not remove constitutional limitations safeguarding essential liberties." See United States v. Robel, 389 U.S. 258, 264 (1967).

This Court should grant certiorari because of the importance of the question pertaining to the proper administration of IEEPA as amended by the PATRIOT Act. See Schilling v. Rogers, 363 U.S. 666, 670 (1960) (granting certiorari to review the proper administration of the Trading with the Enemy Act); American Federation of Musicians v. Wittstein, 379 U.S. 171, 175 (1964) (granting certiorari to an important question of "first impression"); Glus v. Brooklyn Eastern District Terminal, 359 U.S. 231, 232 (1959) (granting certiorari to an important and recurring question). Furthermore, because of the numerous cases now pending and soon to be brought before the lower courts on the very questions presented here for review, this Court should review the issues immediately.; See also Massachusetts Trustees of Eastern Gas and Fuel Assoc. v. United States, 377 U.S. 235, 237 (1964) (granting certiorari

because a considerable number of suits are pending in the lower courts which will turn on resolution of the issues presented for review); United States v. Union Pacific Railroad Co., 353 U.S. 112, 112 (1957) (granting certiorari in view of the public importance the question presented).

"He that would make his own liberty secure must guard even his enemy from oppression; for if he violates this duty he establishes a precedent that will reach himself." Cramer, 325 U.S. at 48 (quotation omitted).

CONCLUSION

THEREFORE, Petitioner GLOBAL RELIEF FOUNDATION, INC., requests that this Court GRANT its Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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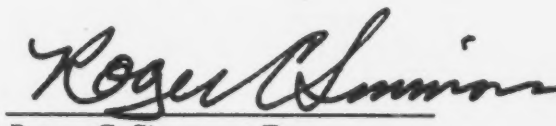
SUPREME COURT OF THE UNITED STATES
RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Pursuant to U.S. Supreme Court Rule 29.6, Global Relief Foundation, Inc., by and through its undersigned attorneys, Gordon & Simmons, LLP, hereby certify that: Global Relief Foundation, Inc. is a domestic, non-profit corporation chartered and headquartered in Illinois having no parent or publicly held company that owns 10% or more of the corporation's stock.



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